Supreme Court, U. S.
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To be argued by
MANSUKHLAL A. KOYA, ESQ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-577

SHANTILAL VALAND,

Petitioner,

versus

IMMIGRATION & NATURALIZATION SERVICE, NEWARK, NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978
No.

SHANTILAL VALAND,

Petitioner,

versus

IMMIGRATION & NATURALIZATION
SERVICE, NEWARK, NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The unreported oral decision of the

Immigration Judge, Newark, New Jersey under

File No. A19 399 008 dated August 30, 1976, appears at Appendix A, infra, page 1a. The unreported decision of the Board of Immigration Appeals (Board), under same file number, dated June 7, 1977, appears at Appendix B, infra, page 12a, and unreported decision of the Board, under same file number, dated July 28, 1977 on Motion for Reconsideration of its decision dated June 7, 1977, appears at Appendix C, infra, page 22a. The unreported Judgment Order of the United States Court of Appeals for the Third Circuit (Court of Appeals), under Docket No. 77-2126, dated May 12, 1978, appears at Appendix D, infra, page 26a.

JURISDICTION

The decision of the Court of Appeals was announced on May 12, 1978. Thereafter,

the petitioner petitioned this Court on August 10, 1978 for an extension of time to file a Writ of Certiorari to review the Judgment Order dated May 12, 1978 of the Court of Appeals, which was granted by this Court on August 16, 1978, extending petitioner's time to and including October 9, 1978. Such order appears at Appendix E, infra, page 28a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals has rendered a decision in conflict with the decision of Court of Appeals of District of Columbia Circuit.

2. Whether the Court of Appeals has departed from the accepted and usual course of judicial proceedings:

a. In not upholding or accepting or comparing or distinguishing or discussing or commenting upon the decision of another Court of Appeals on the same subject matter, to wit, validity of labor certification and authority to invalidate it, and

b. In not giving any reason for denying the petition for review, and

c. In not giving an opportunity for an oral argument inspite of a specific request by the petitioner in his petition for review.

3. Immigration & Naturalization Service (INS) has accepted holding in Castaneda-Gonzales vs. INS as a rule of general applicability. See Matter of Kim, Appendix F, infra, page 30a.

FEDERAL STATUTES

IMMIGRATION & NATIONALITY ACT (ACT)

Section 241(a)(2) of the Act: 8 U.S.C. 1251(a)(2) provides:

> Entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States.

Section 212(a)(14) of the Act: 8 U.S.C. 1182(a)(14) provides:

> Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the

> Attorney General that
>
> (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and
>
> (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

Section 212(a)(19) of the Act: 8 U.S.C. 1182(a)(19) provides:

> Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or

by willfully misrepresenting a material fact.

Section 245(a) of the Act: 8 U.S.C. 1255(a) provides:

> The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him

at the time his application is approved.

STATEMENT OF THE CASE

The petitioner is a 33 year old married male, a native and national of India. He was admitted to the United States at New York, N. Y. on August 24, 1972 as a Visitor and was authorized to remain in the United States until January 15, 1976.

On or about April 4, 1974, the petitioner received a job offer as Bilingual Secretary at gross weekly salary of $165.00 from YOGIJI BAZAR, located at 806 Newark Avenue, Jersey City, New Jersey, dealing in the foods items from India including gift articles and imports of the same.

A labor certification was issued on or about May 3, 1974 in favor of the petitioner by

the U.S. Secretary of Labor. Based upon said labor certification, the petitioner applied for adjustment of status to that of a lawful permanent resident, under Section 245(a) of the Act. Said application was denied.

On August 30, 1976, a hearing was held before the Immigration Judge, upon the charge under Section 241(a)(2) of the Act (Remained longer-Visitor). The petitioner renewed his application for adjustment of status to that of a lawful permanent resident and for exercise of administrative discretion before Immigration Judge, which was denied by an oral decision on the same day and it was ordered that the petitioner be deported to India.

The petitioner preferred an appeal against said order dated August 30, 1976, before the Board. On June 7, 1977, Board affirmed the decision of Immigration Judge.

On July 1, 1977, the petitioner made a motion to re-open and re-consider Board's decision dated June 7, 1977, supported with documentary evidence which was not presented before INS, Immigration Judge or Board of Immigration Appeals. On July 28, 1977, Board denied said motion and re-affirmed its decision dated June 7, 1977, without giving an opportunity for an oral argument.

On August 24, 1977, the petitioner presented a petition before the Court of Appeals for the review of aforesaid decisions of Immigration Judge and Board. Said review petition was denied on May 12, 1978. Court of Appeals did not give an opportunity for an oral argument and did not give any reasons for such denial.

REASONS FOR GRANTING THE WRIT

1. & 2.

The Court of Appeals for the District of Columbia Circuit rendered a decision in the matter of CASTANEDA-GONZALES vs. IMMIGRATION AND NATURALIZATION SERVICE, 564 F. 2nd 417 (D.C. Cir. No. 75-1580). The issue was validity of Labor Certification granted by the U.S. Secretary of Labor and authority to invalidate such certification.

In that case, the Court of Appeals for the District of Columbia Circuit held that the validity of a labor certification may not be reexamined by the INS or the Board other than on a charge under Section 212(a)(19) of the INA, where it must be established that the misrepresentation was not only material but willfully false. The Court further stated that

> "The Attorney General has broad power to inquire into the admissibility and deportability of aliens. This includes the authority to decide whether they are within one of the 31 excludable classes of Section 212(a), but insofar as 212(a)(14) is concerned, the Attorney General's inquiry is limited to whether the Secretary of Labor has determined that the substantive requirements of that subsection are satisfied. Once an alien shows that the Secretary of Labor has made such a determination in his favor, the statutorily delegated enforcement power of the Attorney General is exhausted. There is nothing in subsection 212(a)(14) itself that permits the Attorney General to ignore the Secretary's determination because he decides for himself that under the correct facts a labor certificate should not have been granted. Subsection 212(a)(14) delegates that substantive determination only to the Secretary of Labor and simply directs the Attorney General to ensure that the Secretary has certified the alien. An alien so certified is not excludable under 212(a)(14)."

The petitioner herein was charged under Section 241(a)(2) - Remained longer-Visitor, and not under Section 212(a)(19), where it must be established that the misrepresentation was not only material but was willfully false.

The petitioner contends that the Court of Appeals has rendered a decision in conflict with the decision of the Court of Appeals for the District of Columbia Circuit.

The Court of Appeals did not give any reasons for denial. It did not uphold or accept or compare or comment upon or distinguish or depart from the rationale of the decision of Columbia Circuit. The failure for doing so and the denial of petitioner's petition without giving any reasons must be considered as a decision in conflict.

In addition thereto, by failing to do any of the aforesaid and by not granting an oral argument, although specifically requested in petitioner's brief, the Third Circuit Court has departed from the accepted and usual course of judicial proceeding.

3.

INS has accepted as a rule of general applicability the holding in CASTANEDA-GONZALES vs. INS, 564 F. 2nd 417 (D.C. Cir. No. 75-1580).

In an unpublished opinion dated April 25, 1978, in MATTER OF KIM (Files A34 151 005 through 009), the Board has stated that INS has elected to apply CASTANEDA decision nationwide. (See Appendix F, infra, page 33a).

This is one more reason that the Writ should be issued.

The petitioner has, on page 31 and 32 of his Brief submitted to the Court of Appeals, quoted and relied upon this decision. See Appendix G, infra, page 36a. Had Court of Appeals read the brief pages 31 and 32 and had the Court of Appeals given an opportunity for an oral argument to the petitioner, he certainly would

have pointed out relevancy and importance of this decision.

In fact, petitioner's case is on more solid ground than the MATTER OF KIM. In MATTER OF KIM, there was a charge under Section 212(a)(19) of the Act. But, Immigration Judge did not pass on the Service's allegation under said Section. Therefore, in KIM, record was remanded for further proceeding. Whereas, in the present case, there is no charge under Section 212(a)(19) at all. The only charge is under Section 241(a)(2) (Remained longer-Visitor). (See Appendix E, infra, page 28a.)

The petitioner is a beneficiary of a Labor Certification issued by the U.S. Secretary of Labor on May 3, 1974, which is as follows:

ENDORSEMENTS

Pursuant to the provisions of section 212(a) (14) of the Immigration and Nationality Act as amended I hereby certify that there are not sufficient U. S. workers available and the employment of the above will not adversely affect the wages and working conditions of workers in the U. S. similarly employed.

Make no entry in this section for government agency use only

MAY 3 1974 Edward J. Keating

(Date) (Certifying Officer)

22 IND CODE	23 OCC TITLE	24 OCC CODE
5997	SECRETARY	201.368

Items continued on reverse

31 DATE FORMS ARE RECEIVED AS ACCEPTABLE FOR PROCESSING

LO	SO APR 6 1974
MO	MO

N.J. STATE Dept. of Labor & Industry
Division of Employment Services
Interoffice Clearance & placement
Room 1013, Labor & Industry Bldge.
Trenton, New Jersey 08625

Apr 1970

The Labor Certification is issued under Section 212(a)(14) of the Act and it is still valid. Petitioner has established eligibility for adjustment of status by becoming beneficiary of a labor certification and is entitled to adjustment of status to that of a lawful permanent resident under Section 245(a) of the Act. Therefore, petitioner requests this Court to order INS to adjust his status and issue Form I-151 (Green Card) to the petitioner.

CONCLUSION

For the reasons above stated, a Writ of Certiorari should issue to review the judgment order of the U.S. Court of Appeals for the Third Circuit.

By his attorney,

MANSUKHLAL A. KOYA, P.C.
Suite 1960, 100 Church Street
New York, N.Y. 10007
(212) 233-8285

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A19 399 008 - Newark,
New Jersey August 30, 1976

In the Matter of	)	
	)	
SHANTILAL VALAND	)	IN DEPORTATION
	)	PROCEEDINGS
Respondent	)	

CHARGE: I & N Act - Section 241(a)(2) -
Remained Longer - Visitor

APPLICATION: Adjustment of Status -
Section 245 - I & N Act

IN BEHALF OF RESPONDENT:	IN BEHALF OF SERVICE:
Franklin S. Abrams, Esq. for Abrams & Abrams One Penn Plaza New York, New York 10001	Sydney B. Rosenberg Trial Attorney Newark, New Jersey

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 33-year-old married male,

a native and national of India.

At a hearing held before me on August 30, 1976,

respondent conceded through counsel that the allegations of fact in the Order to Show Cause were true. I find that he entered the United States at Newark, New Jersey about August 24, 1972. At that time he was admitted as a visitor and authorized to remain in the United States until January 15, 1976. He remained in the United States after that date without authorization from the United States Immigration and Naturalization Service. I have concluded from these facts that the respondent is subject to deportation on the charge contained in the Order to Show Cause.

Respondent applied for adjustment of status to that of a permanent resident, under Section 245 of the Immigration and Nationality Act. He claimed eligibility for a visa as a non-preference immigrant by virtue of a Labor Certification as a secretary, issued to an organization

called Yagiji Bazaar, at 806 Newark Avenue, Jersey City, New Jersey. The job offer was made by a man named M. N. Parekh, who said he was the owner, and said he would pay $165 a week.

Testimony at the hearing today by the owner established that the business had started around 1973 and the job offer was made April 8, 1974. The business was brand new and could not afford any employee. It was a Mama and Papa retail store. Mr. Parekh and his wife ran the store, while Mr. Parekh also worked as a conductor on the trains of the Penn Central Railroad. Although Mr. Parekh made a job offer he didn't have a business which required any employees and he certainly couldn't afford to pay anybody $165 a week. In order to stay in business he had to supplement the earnings of the business by his earnings as a conductor on the railroad.

He didn't need any secretary because the few letters that were required could be written by himself. The job offer said that he had an electric typewriter and dictation equipment for a secretary. He testified before me that he never owned an electric typewriter in his business and he never had any dictation equipment. At the beginning he did most of his purchasing in the United States although he now claims that he buys 75% of his merchandise abroad. Although the respondent is represented by an experienced attorney, he has brought no records whatsoever to establish how much business this Yagiji Bazaar does. No evidence has been submitted to establish that this business does any correspondence with anybody or that they are actually importing any merchandise from abroad, or to establish the truth of his story that 75% of his $100,000.00 annual business consists of

imports.

The job offer stated that the respondent was recommended to the employer by a business acquaintance. The evidence established that when the respondent came to the United States in 1972, he said he was coming to visit his brother. It was developed that the brother in the arrival record was Mr. Parekh, who is now supposed to be the employer, and that Mr. Parekh posted a $500 Maintenance of Status bond. Respondent testified that when he came to the United States he told the Immigration office he was a farmer and he was. The family business is farming. His experience as a secretary was supposed to be his work for the Indian Army, where he apparently was a Junior Clerk. There is a substantial difference between a Junior Clerk in any Army and a capable secretary. There appears to be no resemblance in the jobs.

Although the respondent came from a family of farmers and his usual occupation was farmer, he had done some clerical work in the Army. This was supposed to be his qualification for a Secretary in the retail store, where he was supposed to be working 35 hours a week in a store open 7 days a week. I just can't believe that a retail store selling household foods to housewives has so much correspondence that they need a secretary 7 hours a day for 5 days a week, or 5 hours a day for 7 days a week. I am satisfied they have no need for such a secretary.

I note, too, that respondent having breached a bond to guarantee to the Immigration and Naturalization Service that he would not violate his status as a visitor and go to work, applied on February 18, 1973 for an extension of the stay after the first 6 months and that application

for extension said, "My usual occupation is butcher." He said he had not worked in the United States; he had $1000.00 in the United States; and he had sums left behind in India. Despite this application, shortly thereafter, during the same month, he went to work. He worked for a company called Empress Handbag and he worked for a company called Clopay until May of 1976. The job offer by the alleged brother, who is now said to be a cousin, not a brother, is dated April 1974. The employer stated that until May 1976, he did not need any employee and he and his wife managed the business. In addition, he was also able to handle a full time job as a conductor on the Penn Central Railroad.

I find first, that respondent was not a bonafide visitor and any discretion should be exercised against him. I am satisfied that he came to

his "brother" "cousin" for the purpose of getting a job. I do not accept this story, that from August 1972 to February 1973, he was not employed. I am satisfied when he applied for extension of stay that application was not made in good faith. He did not intend to remain here as a visitor. He went to work. He knew at the time he made the application that it was his intention to go to work. I am not satisfied that the job offer in which the Labor Certification was based, was made in good faith. In fact, I find it was not made in good faith. The job offer was for a job which did not exist. I am not satisfied that it exists today. I do not accept the testimony without records of the employer that he has enough business to justify hiring a man. I am satisfied that the respondent is working for this employer solely for the purpose of this application and for no other

purpose.

I have considered whether or not to grant the respondent the privilege of voluntary departure in lieu of deportation. He was granted that privilege in December 1975 and given until January 15, 1976 to leave at his own expense. He apparently ignored that instruction from the Immigration Service. I am satisfied this respondent will not leave, I am satisfied he will have to be deported. I have every sympathy for people in countries with excessive populations, where persons who can emigrate and go to a country where they can make a living, have a tremendous urge to do so. I have no doubt that's what happened in this case. Our Immigration laws, however, are designed to prevent this country from being inundated by people from all over the world who find a tremendous need to emigrate and come to the

United States to look for a job. Those people are welcome if they meet the standards of our Immigration Laws. I am satisfied that not only has this respondent not met the standards of the Immigration Laws, but that he has engaged in substantial conniving in order to get to this point. I have no doubt that if I grant him the privilege of voluntary departure, we would have more of the same. The only solution here is to compel his departure by the deportation process.

ORDER: IT IS ORDERED that the application by the respondent for adjustment of status under Section 245 of the Immigration and Nationality Act be denied, on the ground that the respondent has not established to my satisfaction that the job, for which he has a labor certification, actually exists. If I am held to be wrong, I would deny this application as a matter of

discretion.

IT IS FURTHER ORDERED that the application by the respondent for the privilege of voluntary departure in lieu of deportation be denied as a matter of discretion.

IT IS FURTHER ORDERED that the respondent be deported from the United States to India on the charge contained in the Order to Show Cause.

/s/ Julius Goldberg

Julius Goldberg
IMMIGRATION JUDGE

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

JUN - 7 1977

File: A19 399 008 - Newark

In re: SHANTILAL VALAND

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Franklin S. Abrams, Esq.
Abrams & Abrams
One Penn Plaza
New York, New York 10001

ON BEHALF OF I&N SERVICE: George Indelicato
Appellate Trial Attorney

ORAL ARGUMENT: March 14, 1977

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) - Nonimmigrant visitor, remained longer than authorized

APPLICATION: Adjustment of status under

section 245, or, in the alternative, voluntary departure

In a decision dated August 30, 1976, the immigration judge found the respondent deportable, upon his own admission, on the charge contained in the Order to Show Cause. The respondent's application for adjustment of status was denied. The respondent's application for voluntary departure in lieu of deportation was also denied. The respondent has appealed. We will dismiss the appeal on the issue of adjustment of status, but grant the respondent's request for voluntary departure.

The respondent is a 32-year-old native and citizen of India. He has a wife and two children in India. He entered the United States on August 24, 1972, as a visitor for pleasure. He was authorized to remain until January 15, 1976, but remained thereafter without authority.

The immigration judge found that the respondent was not a bona fide visitor when he came here. Although this has not been proven, the circumstantial evidence clearly points to that conclusion.

When the respondent came to the United States, he said his purpose was to visit his brother. It turns out that the man he visited is his "cousin," one M. N. Parekh. Mr. Parekh posted a $500 Maintenance of Status bond for his "cousin."

On February 18, 1973, the respondent applied for an extension of stay as a visitor. In this application he stated that he was a butcher, that he had not worked in the United States, that he had $1,000 in the United States and more money back in India. Despite this application, he went to work illegally that very month. He worked for two companies, Empress

Handbag and Clopay, until May, 1976.

Meanwhile, he was offered a job by his "cousin," Mr. Parekh, or at least that is what the Labor Department was told. Mr. Parekh is a conductor for the Penn-Central Railroad. He decided to open up what he described at the hearing as an "import-export" business, while still keeping his job as a conductor. The job offer was dated April 4, 1974. The position was that of a bilingual secretary. An application for a labor certification was submitted on April 8, 1974. This "import-export" business is actually a "ma and pa" Indian grocery store in Jersey City, called Yogiji Bazaar. Mr. Parekh admitted that so far he has exported nothing. He also admitted that at the time he made the job offer, he could not afford to hire his "cousin." The store was run by himself and his wife. They imported pickles and papad

and mango pulp from India, rice from Pakistan, beans from Kenya, and raksha, which the respondent described as "religious thread." When the job offer was submitted to the Labor Department, Mr. Parekh claimed his annual sales were $50,000. At the deportation hearing, he admitted that was "only a projection."

There is no claim that the respondent started working for Mr. Parekh at any time before May, 1976. What the immigration judge doubted was whether the respondent does any real work for Yogiji Bazaar even at present.

The job offer stated that the employer had an electric typewriter and dictation equipment. Actually, he had only a manual typewriter, as he admitted.

Under "Efforts you have made to fill the job," Mr. Parekh wrote: "Called agencies; asked around in the Indian community." Yet,

at the deportation hearing, the story apparently was that the respondent had been offered the position as soon as the business was conceived of by Mr. Parekh.

Under "Describe how you learned that alien named above was available," Mr. Parekh wrote: "Recommended by a business acquaintance." This, he admitted, was a fabrication.

The respondent's experience as a secretary supposedly derives from his work as a junior clerk for the Third Gujurat Battalion of the Indian National Guard.

Mr. Parekh testified that he handled all of his correspondence himself before hiring the respondent. He did this, it is to be remembered, while holding down a job as a conductor with the Penn-Central. It does not seem inherently plausible that he would or could hire the respondent as a full-time secretary, and pay

him $715 a month, to handle the correspondence and files of a "ma and pa" grocery store.

The respondent brought no documents to the hearing to support his claim that he worked as a secretary for Mr. Parekh.

Mr. Parekh stated that he could produce documentary evidence in one day, if given the chance. On appeal, the respondent complains that the immigration judge did not grant him the time to submit documentary evidence to buttress his case, and that the immigration judge was biased. We reject these assertions. 8 C.F.R. 242.13 states that the "special inquiry officer may grant a reasonable adjournment either at his own instance or, for good cause shown, upon application by the respondent or the trial attorney." (Emphasis supplied.) The immigration judge stated that he would not grant the respondent's adjustment of status in

any case, so that there was no reason to postpone decision to give the respondent an opportunity to attempt to buttress his case. It was within the proper discretion of the immigration judge to refuse to grant him the opportunity to attempt to salvage a hopeless case. We cannot imagine what sort of documentary evidence could possibly prove that the respondent was Mr. Parekh's full-time secretary, and that Mr. Parekh intended to continue to employ him after he had received permanent resident status. Even if the respondent was the full-time secretary of Mr. Parekh, and even if his offer of employment were not a sham to help his cousin gain permanent residence, a discretionary denial of adjustment would be proper on the basis of the respondent's misrepresentations and his previous illegal employment. Indeed, under the recent amendments to section 245,

the previous illegal employment would be a statutory bar to eligibility for adjustment. See P. L. 94-571, 90 Stat. 2703, enacted October 20, 1976 and effective January 1, 1977.

The immigration judge's decision denying voluntary departure is understandable and supportable, in view of the misrepresentation that pervades this case. However, we choose to grant the respondent the privilege of departing voluntarily.

ORDER: The immigration judge's decision denying adjustment of status is affirmed.

FURTHER ORDER: The respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event the respondent fails so to depart, the respondent shall be deported as provided in

the immigration judge's order.

Chairman

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

JUL 28 1977

File: A19 399 008 - Newark

In re: SHANTILAL VALAND

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF
RESPONDENT: Mansukhlal A. Koya, Esquire
80 Broad Street
New York, NY 10004

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) - Nonimmigrant visitor - remained longer than permitted

APPLICATION: Motion for reconsideration

The respondent has submitted a motion to reconsider our decision of June 7, 1977, along with a request for oral argument and an

extension of his voluntary departure time.

The request for oral argument will be denied. We have carefully considered all of the new evidence submitted by the respondent, and see no reason to change our prior decision. Indeed, the new evidence confirms that our decision of June 7 was correct. We have no authority to grant the respondent an extension of his time for voluntary departure. That authority lies exclusively with the local District Director. See 8 C.F.R. 244.2.

In our prior decision, which we hereby incorporate by reference, we stated that "[i]t does not seem inherently plausible that [Mr. Parekh] would or could hire the respondent as a full-time secretary, and pay him #715 a month, to handle the correspondence and files of a 'ma and pa' grocery store."

Counsel states that the respondent was

employed by Mr. Parekh only between May, 1976 and August, 1976. Counsel states that Mr. Parekh will rehire the respondent as soon as his status is adjusted. At the deportation hearing, the respondent testified that he was earning $715 a month. This is supported by a W-2 Form for the quarter ending June 30, 1976. (Ex. 24)

However, Yogiji Bazaar's balance sheet for the year ending December 31, 1976 shows that only $1,598 was paid in wages that year. (Ex. 21) By our calculation, four months' wages at $715 a month equals $2,860, not $1,598.

Yogiju Bazaar's 1976 United States corporation income tax return also shows $1,598 as the total for salaries and wages paid. The same return shows that the company's profits amounted to $1,118 for that year. (Ex. 18)

The company's 1975 United States

corporation income tax return shows a loss of $531.

We do not see how a little grocery store with that kind of profit and loss record could even support Mr. Parekh and his wife. This is presumably why he also works part time as a conductor for the Penn-Central Railroad. It is clear to us that Mr. Parekh is in no position to hire the respondent full time at any salary, much less $715 a month.

In view of the repeated misrepresentation in this case, and in light of the store's profit and loss record, we attach little weight to the W-2 Form.

ORDER: The decision of June 7, 1977 is affirmed.

Chairman

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-2126

SHANTILAL VALAND,
Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE, Newark, New Jersey

On Petition for Review of an Order
of the Board of Immigration Appeals
Entered June 7, 1977

Submitted Under Third Circuit Rule 12(6)
May 4, 1978

Before: ADAMS, VAN DUSEN, and ROSENN,
Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised by Petitioner, it is

ADJUDGED AND ORDERED that the petition for review is hereby denied, and order of the Board of Immigration Appeals be and is hereby affirmed.

BY THE COURT,

/s/ Arlen M. Adams
Circuit Judge

ATTEST:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: MAY 12 1978

Certified as a true copy and issued in lieu of a formal mandate on June 5, 1978.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-183

SHANTILAL VALAND,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, ETC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 9, 1978.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 16

day of August, 1978.

APPENDIX F

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
WASHINGTON, D.C. 20530

APR 25 1978

Files: A34 151 009 - Philadelphia
A34 151 006
A34 151 007
A34 151 008
A34 151 005

In re: YUN SOOK KIM
YONG AE KIM
SANG YONG KIM
IN YONG KIM
IL YONG KIM

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANTS: Richard D. Steel, Esquire
636 Public Ledger Bldg.
Sixth & Chestnut Streets
Philadelphia, PA 19106

ON BEHALF OF I&N SERVICE: Mary Jo Grotenrath
Appellate Trial Attorney

Sydney B. Rosenberg
Trial Attorney

ORAL ARGUMENT: July 27, 1977

EXCLUDABLE: Sec. 212(a)(14), I&N Act (8 U.S.C. 1182(a)(14) - No valid labor certification (adult male applicant)

Sec. 212(a)(19), I&N Act (8 U.S.C. 1182(a)(19) - Visa obtained by willfully misrepresenting material facts (adult male applicant)

Sec. 212(a)(20), I&N Act (8 U.S.C. 1182(a)(20)) - Not in possession of valid immigrant visa (adult female applicant and three children)

APPLICATION: Admission as lawful permanent residents

The respondents appeal from a decision of an immigration judge dated March 4, 1977. In his decision, the immigration judge found the principal male applicant excludable under section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14), and the

other applicants excludable under section 212(a)(20) of the Act, 8 U.S.C. 1182(a)(20). The record will be remanded for further proceedings and the entry of a new decision.

The applicants are all natives and citizens of Korea. The principal applicant was issued an immigrant visa on October 15, 1973 primarily on the basis of a labor certification approved by the Department of Labor on August 21, 1972. The female applicant and the three other applicants in these proceedings were issued visas under the provisions of section 203(a)(9) of the Act, 8 U.S.C. 1153(a)(9), as the spouse and children of the principal applicant who were accompanying or following to join him. As such, their admissibility depends on that of the principal applicant.

After the immigration judge rendered his decision, the United States Court of Appeals

for the District of Columbia Circuit rendered its decision in Castaneda-Gonzalez v. INS, 564 F. 2d 417 (1977). The Service has elected to apply that decision nationwide. Also, the Department of Labor issued new regulations effective February 18, 1977 concerning the invalidation of labor certifications by the Immigration and Naturalization Service. See Matter of Patel, Interim Decision 2632 (BIA 1978).

In light of these developments, and considering that the immigration judge did not pass on the Service's allegation that the principal applicant is excludable under section 212(a)(19) of the Act, 8 U.S.C. 1182(a)(19), we will remand the record so as to allow the parties to present such additional evidence as they deem necessary in light of the above and for the immigration judge to pass initially on the charge under section 212(a)(19) of the Act and

consider the charge under section 212(a)(14) of the Act in light of Castaneda-Gonzalez v. INS, supra, and the new regulations. The immigration judge should certify his decision to us for review if adverse to the applicants.

ORDER: The record is remanded for further proceedings not inconsistent with the foregoing opinion and the entry of a new decision.

Chairman

APPENDIX G

77-2126

To be argued by
MANSUKHLAL A. KOYA, ESQ.

In The

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

x

SHANTILAL VALAND
(A19 399 008)

Petitioner,

vs.

IMMIGRATION & NATURALIZATION SERVICE

Respondent.

PETITIONER'S BRIEF

MANSUKHLAL A. KOYA
Attorney for the Petitioner
80 Broad Street
New York, N.Y. 10004
(212) 425-0055

[31] VALIDITY OF LABOR CERTIFICATION MAY NOT BE REEXAMINED BY IMMIGRATION & NATURALIZATION SERVICE

The petitioner contends that the validity of a labor certification may not be re-examined by Immigration & Naturalization Service or by the Board other than on a charge under Section (212)(a)(19) of the Immigration & Nationality Act, where it must be established that the misrepresentation was not only material but willfully false.

In a landmark decision in Castaneda-Gonzalez v. INS, __F. 2d___(D.C. Cir., No. 75-1580, May 27, 1977), the Court of Appeals held that the validity of a labor certification may not be re-examined by the Service or the Board other than on a charge under Section 212 (a)(19) of the INA, where it must be established that the misrepresentation was not only material

but willfully false. The Court of Appeals further stated that

> "The Attorney General has broad power to inquire into the admissiblity and deplorability of aliens. This includes the authority to decide whether they are within one of the 31 excludable classes of Section 212(a), but insofar as (212) (a)(14) is concerned the Attorney General's inquiry is limited to whether the Secretary of Labor has determined that the substantive requirements of that subsection are satisfied. Once an alien shows that the Secretary of Labor has made such a determination in his favor,
> [32] the statutorily delegated enforcement power of the Attorney General is exhausted. There is nothing in subsection 212 (a)(14) itself that permits the Attorney General to ignore the Secretary's determination because he finds it factually defective and to decide for himself that under the correct facts a labor certificate should not have been granted. Subsection 212(a)(14) delegates that substantive determination only to the Secretary of Labor and simply directs the Attorney General to ensure that the Secretary has certified the alien. An alien so certified is not excludable under 212(a)(14)."

Supreme Court, U. S.
FILED
DEC 14 1978
MICHAEL RODAK, JR., CLERK

No. 78-577

In the Supreme Court of the United States

OCTOBER TERM, 1978

SHANTILAL VALAND, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-577

SHANTILAL VALAND, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 26a-27a) is not reported. The original opinion of the Board of Immigration Appeals (Pet. App. 12a-21a), its opinion on rehearing (Pet. App. 22a-25a), and the decision of the immigration judge (Pet. App. 1a-11a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1978. Mr. Justice Brennan extended the

time for filing a petition for a writ of certiorari to October 9, 1978, and the petition was filed on October 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's application for adjustment of status to that of an alien lawfully admitted for permanent residence was properly denied.

2. Whether the decision of the court of appeals was improper because it was issued without oral argument and in the form of a judgment order summarily affirming the Board of Immigration Appeals.

STATUTES INVOLVED

8 U.S.C. 1182 provides in pertinent part:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(8) of this title;
>
> * * * * *
>
> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;
>
> * * * * *

8 U.S.C. 1251 provides in pertinent part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;
>
> * * * * *

8 U.S.C. 1255 provides in pertinent part:

> (a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his

discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

* * * * *

STATEMENT

Petitioner, a native and national of India, entered the United States in 1972 as a visitor and was authorized to remain until January 15, 1976 (Pet. App. 13a). He remained in the United States beyond that date, without authorization (*ibid.*). In August 1976, he was brought before an immigration judge for a hearing on the question of his deportability under 8 U.S.C. 1251(a)(2). At the hearing, through counsel, petitioner sought to avoid deportation by applying under 8 U.S.C. 1255 for a discretionary adjustment of his immigration status from visitor to permanent resident alien. In support of his application, petitioner claimed that he was eligible for a non-preference immigration visa because of his certification by the Department of Labor as a secretary pursuant to 8 U.S.C. 1182(a)(14). The immigration judge denied the relief sought and ordered deportation (Pet. App. 10a-11a).

The immigration judge first found (Pet. App. 2a) that petitioner had overstayed his authorization to

remain in the United States and was thus deportable under 8 U.S.C. 1251(a)(2). Turning to petitioner's request for adjustment of status, the judge observed that there were numerous misrepresentations and inconsistencies in petitioner's explanation of his background and employment history. For example, in petitioner's application for a labor certificate he had claimed that he had been given an offer to earn $165 per week at an import-export firm as a secretary using an electric typewriter and dictation equipment. The immigration judge found, however, that the offer was made by petitioner's cousin to work at a brand new "Mama and Papa retail store" which had neither an electric typewriter nor dictation equipment, did not require any employees, and "certainly couldn't afford to pay anybody $165 a week" (Pet. App. 3a-4a). The evidence further showed that when petitioner entered the United States he represented that he was a farmer and that he was coming to visit his brother (Pet. App. 5a). In fact, his "brother" was the cousin who owned the import-export store (*id.* at 5a, 7a).[1] The immigration judge also noted that petitioner had worked for two other companies since entering the United States and that he had thereby broken his guarantee to the Immigration and Naturalization Service that he would not obtain employment while in the United States in a visitor status (*id.* at 6a-7a).

---

[1] At another point, petitioner had represented that his occupation was "butcher" (*id.* at 7a).

On the basis of this evidence, the immigration judge found that petitioner was not a bona fide visitor (*id.* at 7a), that the job offer to him was not made in good faith (*id.* at 8a), and that petitioner had engaged in "substantial conniving" to avoid the requirements of the immigration laws (*id.* at 10a). The judge denied the application for adjustment of status on the ground that petitioner was ineligible for such relief because he had failed to show that the job for which he had been granted the labor certificate actually existed (*ibid.*). Alternatively, in view of petitioner's misrepresentations and misconduct, the immigration judge denied the application as a matter of discretion (*id.* at 10a-11a). The immigration judge then ordered petitioner deported pursuant to 8 U.S.C. 1251(a)(2) (*id.* at 11a).

Petitioner appealed to the Board of Immigration Appeals. The Board affirmed the decision of the immigration judge denying adjustment of status, both for ineligibility and on discretionary grounds (Pet. App. 19a-20a), but granted petitioner the privilege of voluntary departure in lieu of deportation (*id.* at 20a). Petitioner applied for reconsideration before the Board, which reaffirmed its prior decision (Pet. App. 22a-25a). The court of appeals affirmed by judgment order (Pet. App. 26a-27a).

ARGUMENT

1. a. In passing on an alien's application for adjustment of status to that of a person lawfully admitted for permanent residence, the Attorney General, acting through the Immigration and Naturalization Service, must determine whether the applicant is eligible for such relief and then decide whether the relief is warranted "in his discretion and under such regulations as he may prescribe." 8 U.S.C. 1255(a). Where adjustment of status is denied in the discretion of the Attorney General, the burden of demonstrating an abuse of discretion is on the applicant. See *Thomaidis* v. *INS*, 431 F.2d 711 (9th Cir. 1970), cert. denied, 401 U.S. 954 (1971). Petitioner does not assert that this discretion was abused in this case; nor did he proffer substantial evidence showing that the discretionary decision denying adjustment was arbitrary or capricious. See *Tuan* v. *INS*, 531 F.2d 1337 (5th Cir. 1976).

One court of appeals has expressly ruled, and others offer support for the proposition, that an immigration judge's finding that an applicant was not a bona fide non-immigrant at the time of entry into the United States "without more would be sufficient to support discretionary refusal to grant adjustment of status under [8 U.S.C. 1255]." *Faddah* v. *INS*, 553 F.2d 491, 495 (5th Cir. 1977); see *Marino* v. *INS*, 537 F. 2d 686 (2d Cir. 1976); *Soo Yuen* v. *INS*, 456 F.2d 1107 (9th Cir. 1972); *Ameeriar* v. *INS*, 438 F.2d 1028 (3d Cir.), cert. dismissed, 404 U.S. 801 (1971); *Chen* v. *Foley*, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968). The immigration judge here found, among other things, that petitioner "was not a bonafide visitor" (Pet. App. 7a) and "did not intend to remain here as a visitor" (*id.* at 8a).

Those findings are supported by substantial uncontested evidence and justify the discretionary denial of adjustment of status.

b. Petitioner contends, however, that the order of the Court of Appeals for the Third Circuit in this case conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in *Castaneda-Gonzalez* v. *INS*, 564 F.2d 417 (D.C. Cir. 1977). In *Castaneda-Gonzalez*, an alien was ordered deported on the ground that, while possessing a labor certificate from the Secretary of Labor, he was not qualified for the position specified in the certificate. The immigration judge concluded that the alien was excludable because he had entered the United States without meeting the requirements of the labor certification provision, 8 U.S.C. 1182(a)(14), and was therefore deportable under 8 U.S.C. 1251(a)(1). The court of appeals rejected this conclusion, holding that an alien who possesses a labor certificate issued by the Secretary of Labor could not be deported for violation of 8 U.S.C. 1182(a)(14), although he would be excludable under 8 U.S.C. 1182(a)(19), and therefore deportable under 8 U.S.C. 1251(a)(1), on a showing of willful and material misrepresentation. 564 F.2d at 422-425, 434.

The petitioner in this case was not ordered deported under 8 U.S.C. 1251(a)(1) for possessing a false labor certificate under 8 U.S.C. 1182(a)(14). Petitioner was found deportable under 8 U.S.C. 1251(a)(2) for overstaying his visitor's visa. The validity of his labor certificate was considered only with respect to his application for adjustment of status,

which was denied on discretionary grounds as well as for ineligibility. The decision in *Castaneda-Gonzalez* is thus inapposite. "To prove overstay, the respondent need only show a nonimmigrant's admission for a temporary period, that the period has elapsed, and that the nonimmigrant has not departed. Any fraud or misrepresentation at time of entry is irrelevant to the charge of overstay * * *." *Milande* v. *INS*, 484 F.2d 774, 776 (7th Cir. 1973). There is no dispute in this case that petitioner was granted authorization to remain in the United States only until January 15, 1976, and that he remained in this country beyond that time. Deportation for overstaying the time permitted in petitioner's visitor's visa was therefore appropriate.

c. We note additionally that while the immigration judge did not specify this ground as a basis for deportation in this case, he made all the necessary findings to support a determination of willful and material misrepresentation to induce entry that would justify exclusion of petitioner pursuant to 8 U.S.C. 1182(a)(19). Aliens who have procured a visa or other documentation of entry by fraud or misrepresentation are ineligible for admission under 8 U.S.C. 1182(a)(19) and are thus subject to deportation under 8 U.S.C. 1251(a)(1). The immigration judge determined that petitioner had engaged in "substantial conniving" (Pet. App. 10a) with respect to the immigration laws and that the job offer on which his labor certificate was based not only "was not made in good faith" but "was for a job which did not exist" (*id.* at 8a). These findings, which are not chal-

lenged by petitioner, constitute proof of willful and material misrepresentation amounting to fraud. See, *e.g.*, *United States* v. *Van Drunen*, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). By not formally declaring petitioner ineligible under 8 U.S.C. 1182(a)(19), however, the immigration judge followed the general rule that where a discretionary decision is authorized, a finding of statutory ineligibility is unnecessary. As this Court stated in *INS* v. *Bagamasbad*, 429 U.S. 24, 25-26 (1976) (per curiam; citations omitted):

> As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach. Here, it is conceded that respondent's application would have been properly denied whether or not she satisfied the statutory eligibility requirements. In these circumstances, absent an express statutory requirement, we see no reason to depart from the general rule and require the immigration judge to arrive at purely advisory findings and conclusions as to statutory eligibility.

2. Petitioner contends (Pet. 13) that the court of appeals acted improperly in failing to grant oral argument and in issuing a judgment order without specifying the reasons for its decision. In an administrative context, this Court has held that "[c]ertainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised." *FCC* v. *WJR, The Goodwill Station*, 337 U.S.

265, 276 (1949). See also *NLRB* v. *Local 42, International Association of Heat and Frost Insulators*, 476 F.2d 275, 276 (3d Cir. 1973) (en banc). Similarly, this Court has concluded "that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions" and that "[t]hat is especially true with respect to summary affirmances." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam). See *NLRB* v. *Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970). The Third Circuit judgment order recites that it was issued "[a]fter consideration of the contentions raised" (Pet. App. 27a). Petitioner fails to suggest any basis for a conclusion that more was required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
SAMUEL M. FORSTEIN
Attorneys

DECEMBER 1978

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-577

SHANTILAL VALAND,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE, NEWARK, NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978
No. 78-577

SHANTILAL VALAND,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, NEWARK, NEW JERSEY,

Respondent.

REPLY BRIEF FOR THE PETITIONER

PETITIONER'S STAY WAS NOT UNAUTHORIZED

The respondent in its brief contends that the petitioner was authorized to remain until January 15, 1976. He remained in the

United States beyond that date. But, this argument has no bases. Petitioner's application for adjustment of status was denied by the District Director on December 15, 1975, but neither an order of deportation was entered against him by District Director nor an order to show cause was served upon the petitioner commencing deportation proceedings.

The Act gives a right to an alien to renew his application before the Immigration Judge in a deportation proceeding and apply for a discretionary relief. The petitioner cannot avail himself of this right if he leaves the country. 8 CFR 245.2(a)(3) provides as follows:

> "The departure from the United States of an applicant for permanent resident status under section 245 of the Act or this part who is under deportation proceedings shall be deemed an abandonment of his application constituting grounds for termination thereof if the deportation proceeding is terminated by reason of the departure.

> "The departure of an applicant who is not under deportation proceedings shall be deemed an abandonment of his application constituting grounds for termination thereof . . ."

It is evident from the aforesaid provision that the departure of the petitioner would have amounted to the abandonment of his application for adjustment of status from visitor to that of a lawful permanent resident of U.S.A.

The petitioner received labor certification on or about May 3, 1974 and immediately applied for adjustment of status. Thereafter, there were continuous proceedings on this application to date. Petitioner's departure would have amounted to abandonment of his application. Therefore, to say that petitioner remained in the United States beyond that date without authorization is incorrect. Additionally, the Court will please note that Appeal to the Board of Immigration and Review Application to the Court of Appeals automatically

stays deportation. 8 CFR 3.6(a) and U.S.C. 1105a(a)(3).

NON COMPLIANCE WITH
8 CFR 242.16(d) HEARING

The respondent has, in its brief, page 9, paragraph starting with (c), contended that Immigration Judge has made all the necessary findings to support a willful and material misrepresentation to induce entry that would justify exclusion of petitioner pursuant to 8 U.S.C. 1182(a)(19).

The petitioner contends that such findings are in violation of the mandate of 8 CFR 242.16(d). Said regulation reads as follows:

> "A trial attorney who has been assigned to a case may at any time during a hearing lodge additional charges of deportability, including factual allegations against the respondent. The additional factual allegations and charges shall be submitted in writing and entered as an exhibit in the record. The special inquiry officer shall read the additional

> factual allegations and charges to the respondent and explain them to him in non-technical language. The special inquiry officer shall advise the respondent if he is not represented by counsel that he may be so represented and also that he may have a reasonable time within which to meet the additional factual allegations and charges. The respondent shall be required to state then and there whether he desires a continuance for either of these reasons. Thereafter, the provisions of paragraph (b) of this section shall apply to the additional factual allegations and lodged charges."

If during the hearing Immigration Judge or the Trial Attorney noticed that evidence has come on record which requires findings as to fraud or willful and material misrepresentation, then each should have followed mandate of 242.16(d), and thereafter Immigration Judge should have followed 242.16(b): pleading by respondent:

> "The special inquiry officer <u>shall</u> require the respondent to plead to the order to show cause by stating

whether he admits or denies the factual allegations and his deportability under the charges contained therein."

In this case, the charge is only under section 241(a)(2): Non-Immigrant visitor remained longer than permitted. See appendix "A" page 1a to the petition. There is no charge under section 8 U.S.C. 1182(a)(19). A review of entire record indicates that the Immigration Judge has failed to comply with aforesaid mandatory provisions.

By failing to follow 8 CFR 242.16(d) & (b), the Immigration Judge denied the petitioner procedural due process of law.

PETITIONER DID CHALLENGE THAT IMMIGRATION JUDGE HAS ABUSED DISCRETION AND HIS DECISION WAS ARBITRARY, CAPRICIOUS AND IMPROPER.

The respondent has in its brief con-

tended that the petitioner has not challenged that Immigration Judge has abused his discretion or his decision was arbitrary and capricious. This contention shows that the respondent has not read the entire record before preparing their brief in opposition.

In fact, the petitioner has, in his brief submitted to the Board of Immigration Appeals and to the Third Circuit, challenged such findings together with other findings of Immigration Judge referred to by the respondents in its brief herein. Such challenges are included in Point 1 through 15 of the petitioner's brief submitted to the Third Circuit. If this Court analyses the entire record, it will become clear that the Immigration Judge's findings do not satisfy the requirement of 8 CFR 242.14:

EVIDENCE:

"A determination of deportability

> shall not be valid unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true."

INS v. BAGAMASBAD

The respondent has in its brief on page 10 cited INS v. Bagamasbad. But, facts in that case were different in that representations in that case were materially and willfully false whereas in this case the representation as 'farmer' at visitor's visa application and as 'butcher' at subsequent extension of stay application in this country were neither material nor willfully false. As contended in point 9 of petitioner's brief before Third Circuit, on pages 26 through 30. None of the representation was used to induce Secretary of Labor to issue labor certification or to INS to adjust the status. Petitioner's family busi-

ness was farming but he also worked as a clerk in the Army. The record, as it is, does not support finding of material or willfully false representation. Besides, the petitioner has challenged such findings before the Third Circuit.

The Form MA 7-50B (Admn. Record: Ex. 3, pages 163 & 164: Item 30) containing representations as to "electric typewriter" and "dictation equipment" is neither prepared nor signed by the petitioner. He has no knowledge of what is said on this Form. Therefore, to say that he made aforesaid representations is not correct and is not supported by the record and cannot be held against him.

ORAL ARGUMENTS

The respondent on page 10 paragraph

numbered 2 contends that in administrative contact, this Court has held to the effect that constitution does not require oral argument. But, in this case, there was a specific request and such request was made because there were findings which can only be put to the Court's attention at an oral argument by referring to actual pages, lines and language of the Transcript. Besides, petitioner wanted to discuss in detail rationale of Castaneda - Gonzales, by analyzing the various aspects of that case, and 8 CFR 242.16(d) & (b). Again, this was not a frivilous review application. It contained a Landmark decision which required from the Third Circuit something more than a three-line decision. The Court will please note that the Third Circuit decision was made on April 12, 1978 and Immigration & Naturalization Service accepted holding in Castaneda - Gonzales

by Board decision of April 25, 1978. Allowance of the oral argument would have given an opportunity to the petitioner to point out this decision to the Court.

Why did the Third Circuit refrain from commenting on Castaneda - Gonzales? Was not it a decision of another Court of Appeals?

The fact remains that, in Matter of Kim, decided by the Board of Appeals, the Immigration & Naturalization Service has accepted as a rule of general applicability the holding in Castaneda - Gonzales v. INS.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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